Q. *State your name and business address.*

A. John Arthur Bower, Jr., Ph.D

Department of Natural Resources

Aquatic Resources Division

P.O. Box 47027

1111 Washington St SE

Olympia, WA 98504-7027

Q. *Where are you employed and what is your job title?*

A. Aquatic Resources Division

Transaction Analyst

As a transaction analyst, I serve as the division's expert on the state's historic aquatic land management laws, regulations, policies, procedures, and actions. Prepare transactional histories associated with contaminated sediment sites utilizing documents from Department of Natural Resources (DNR) and other federal and state records.

Q. *What is your educational background?*

A. BA History, University of Washington, 1970

BS Environmental Studies, Huxley College of Environmental Studies, Western Washington University, 1979

MA Geography, University of Washington, 1982

PhD Geography, University of Washington, 1990

Q. *Summarize your professional experience?*

A.

Aug. 1977 to Aug. 1978	Research Assistant. Worked as an intern for Roger M. Leed, Esq., and later as a member of his staff, developing facts and preparing documents for NRC hearings related to the Skagit Nuclear Power Project, as well as hearing preparation before other adjudicatory and administrative agencies related to other environmental projects.
Oct. 1978 to Aug. 1981	Research Analyst. Conducted research for the Skagit Indian Tribe/Skagit System Coop. for Nuclear Regulatory Commission proceedings regarding Skagit Nuclear Power Facility; for Federal Energy Regulatory Commission (FERC) hearings on Ross Dam; and for future FERC proceedings on Baker Dam; and provided staff support for Trans Mountain and Northern Tier Pipelines.
Jan. 1982 to Mar. 1987	Consultant. Conducted research and prepared reports for the Confederated Tribes of the Colville Reservation for Indian Court of Claims, Federal Appeals Court and Interior Department proceedings on Grand Coulee Dam; as well as

	developed evidence for potential damage claims on Wells Dam. Researched archival records for the Quinault Indian Nation related to allotment history, and reservation history in Southwest Washington, as well as treaty fishing rights.
April 1987 to Aug. 1988	System Analyst. Conducted pilot project for Computer Sciences Corp. and the United States Environmental Protection Agency regarding the location and characterization of monitoring wells for a GIS database.
Sept. 1988 to June 1996	Consultant. Historical and geographical expert witness in Acquavella for the Yakama Indian Nation related to water rights; also researched and prepared reports related to Hell Roaring Irrigation District and its irrigation ditch right of way, reservation boundary issues, and treaty fisheries. Conducted historical research for the Confederated Tribes of the Colville Reservation related to U.S. v. Oregon, reservation, boundary issues, and for a history of the Confederated Tribes of the Colville Reservation. Conducted research on U.S. v. Washington Chinook, Chehalis band petitions for the Quinault Indian Nation; conducted research and prepared evidence to explain allotment history and associated fishing locations on

	Quinault Reservation. Also researched history of the Hoh reservation.
June 1996 to Present	Transaction Analyst. Conduct research, develop evidence and prepare reports related to contaminated sediment sites such as Thea Foss, Middle Waterway for the Department of Natural Resources; prepare transaction histories; and develop statutory history of Washington State aquatic land laws.

Q. *What is the subject matter of your testimony?*

A. Legal authorities related to the issuance of easements over state owned aquatic lands.

Q. Have you read the application to Energy Facility Site Evaluation Council (EFSEC), specifically Sec. 1.1.1 Applicant and Sec. 2.2 legal description?

A. Yes. I note that in Section 2.2.1.1 that the pipeline company states that "when easement and agency negotiations are completed and the final alignment has been determined, the applicant will submit to EFSEC a full legal description of the pipeline alignment. After construction, an additional survey will be conducted and an as built legal description will be submitted to EFSEC."

Q. What are state owned aquatic lands?

A. By Article XVII, § 1 of the constitution, Washington State asserted

> "its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tides, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes...."

In 1984, the legislature defined State-owned aquatic lands to mean

> "those aquatic lands and waterways administered by the Department of Natural Resources or managed under RCW 79.90.475 by a Port District. 'State owned aquatic lands' does not include aquatic lands owned in fee by, or withdrawn for the use of, state agencies other than the department of natural resources."

It should be noted that RCW 79.01.004 defines "public" lands to include "tidelands, shorelands and harbor areas...and the beds of navigable waters belonging to the state."

Q. *Who manages state owned aquatic lands on behalf of the state?*

A. State owned aquatic lands include tidelands, shorelands, oyster lands, waterways, harbor areas, and beds of navigable waters. These are lands held in public trust by the state and managed over time for the people of the state. (Equal footing doctrine, RCW 79.01.004) The 1984 legislature found that "state-owned aquatic lands are a finite natural resource of great value and irreplaceable public heritage." (RCW 79.90.450)

Q. *How has the legislature delegated management authority for state owned aquatic lands?*

A. The legislature has explicitly delegated its authority to manage state owned aquatic lands to DNR by statute. For the purposes of this testimony, the relevant statutes which explicitly delegate to DNR authority to issue easements, in addition to RCW 79.90.450, .455 and .460, may be found in Ch. 79.91 RCW, a set of 1982 statutes which codified Session Laws 1927, Ch. 255, Sections 92-97; and Session Laws 1961, Ch. 73, Sections 6-8. Additional legislative guidance may be found in RCW 90.48.386 directing that DNR insert language in the "leases" which require the "lessees" to operate according to the plan of operations; that they operate in compliance with all of the requirements of RCW 90.48; and that any violation of those requirements "may be grounds for termination of the lease." The legislature has also in the past delegated to DNR the authority to issue leases for beds of navigable waters for booming purposes (RCW 79.95.010-040), and for the Navy facility at Port Gardner (RCW 79.95.050-060). In authorizing the Navy to lease Port Gardner bedlands, the legislature required DNR to include in the lease provisions to hold the state of Washington harmless from any use of the property by the Navy; compliance with all 401 water quality certification terms and conditions; and enforcement of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Resource Conservation and

Recovery Act (RCRA) or any other federal or state law.

Q. *Has the legislature ever delegated management authority for aquatic lands to agencies other than DNR?*

A. The legislature has, from time to time, transferred management authority to a portion of those lands to agencies other than DNR, which are not included within the definition of state owned aquatic lands. (RCW 79.90.465 (12)). It must be emphasized that this transfer of management authority by the legislature has been made explicitly by legislation. In this context, I list a few examples of such legislative action. The agencies which have acquired management authority from the legislature for state owned aquatic lands have included Parks and Recreation (RCW 43.51.240) , Transportation (RCW 47.12.023 and 47.12.026), and Fish and Game (e.g. Session Laws 1941, Ch. 190, pp.536-537 and Session Laws 1951, Ch. 77, pp. 214-215), as well as various counties and cities (e.g. Session Laws 1907, Ch. 117, pp. 214-216; Session Laws 1907, Ch. 17, p.23; Session Laws 1949, Ch. 81, pp. 182-183). Those lands are no longer considered state owned aquatic lands (RCW 79.90.465 (12)). In a few cases in the past, the legislature has transferred the beds of navigable waters to local entities, such as the beds of rivers to Commercial Waterway Districts as part of waterway development (Session Laws 1911, Ch. 11, pp. 21-22); or to other State Agencies for such purposes as the "public places" assigned to the Department of Transportation as part of highway

development (RCW 47.12.023 and .026); or to the U.S. Bureau of Reclamation in order to facilitate the development of the Yakima and Okanogan Reclamation Projects (Session Laws 1905, Ch. 88, pp. 180-184); or to the United States for forts, magazines, arsenals or dock yards (Session Laws 1889-1890, Ch. XIV, p. 428; Session Laws 1891, Ch. XVIII, pp. 31-32; Session Laws 1939, Ch. 126, pp. 357-358). In many cases, the title transfer, easement, included a reversionary clause. Depending on the statute, this transfer of management authority by the state has generally been executed by an order issued by either the State Harbor Line Commission, the Board of Natural Resources, or the Commissioner of Public Lands. Where the legislature has not made such an express and explicit transfer of management authority, the authority resides in the Department of Natural Resources and the Commissioner of Public Lands.

Q. *Does the Olympic Pipeline Co. application to EFSEC include state owned aquatic lands?*

A. Yes.

Q. *Has the Commissioner of Public Lands ever issued easements to the Olympic Pipeline Co. for pipelines in the State of Washington?*

A. Yes, for the Olympic Pipeline North-South pipeline. In 1964, several easements were issued to Olympic Pipeline Co. under the Act of March 8, 1961, Session Laws 1961, Ch. 73, Sections 6-8. These easements were in the form of an "Order

and Certificate of Grant of Waterway," and authorized the pipeline company the "right, power, privilege and authority" to construct and operate a pipeline over the tidelands and beds of navigable waters described in the document. There appears to be no conditions applied in those easements.

In 1973, the Olympic Pipeline Co. made application to DNR for several more easements over state owned aquatic lands. In 1974, the Commissioner of Public Lands again issued easements for rights of way to the Olympic Pipeline Co. In those agreements, several conditions were placed in the contracts, including that the instrument required the grantee to comply with all applicable laws; provided that the state would notify the pipeline company of any instance of non-compliance "including all Department of Natural Resources regulations, county and municipal laws, ordinances, or regulations in effect and authorized by law or laws of the State of Washington"; required the Grantee to "exercise every means to prevent contamination or pollution of the water as a result of any operation hereunder"; and it also directed the Grantee "to prevent fuel, oil, grease or other deleterious material from entering the water as a result of any operation on the right of way area."

Q. *Since these easements were issued, has the legislature given additional management guidance to DNR on how it was to manage state owned aquatic lands?*

A. Yes. In 1984, the legislature recognized "that the state owns these aquatic lands in fee and has delegated to the department of natural resources the responsibility

to manage these lands for the benefit of the public". (RCW 79.90.545)

The legislature enacted legislation which explicitly required that the management of state owned aquatic lands "shall be in conformance with constitutional and statutory requirements", and directed DNR to manage those lands by balancing four public benefits (RCW 79.90.455):

1. Encouraging direct public use and access;
2. Fostering water-dependent uses;
3. Ensuring environmental protection;
4. Utilizing renewable resources

RCW 79.90.455 then directed DNR that "generating revenue in a manner consistent with subsections (1) through (4) of this section is a public benefit." DNR is also directed to "consider the natural values of state-owned aquatic lands as wildlife habitat, natural area preserves, representative ecosystem, or spawning area" as well as navigation and commerce uses. (RCW 79.90.460 (3))

The Commissioner of Public Lands as the Administrator of the Department, makes the final decisions regarding how those public benefits are balanced (Ch. 43.30 RCW).

Q. *Are there any other factors which the Commissioner must take into account prior to making her decision?*

A. Yes. Among other considerations, RCW 79.90.460 (1), the legislature has directed the Commissioner that between two competing water-dependent uses, "priority shall be given to uses which enhance renewable resources, waterborne commerce, and the navigational and biological capacity of the waters, and to state wide interests as distinguished from local interests."

Q. *What water use classification are pipelines?*

A. DNR considers pipelines to be a non-water dependent use.

Q. *What priority does non-water dependent uses have in relation to other use classifications?*

A. RCW 79.90.460 defines non-water dependent uses as low priority uses providing minimal public benefits. Such uses will not be permitted "except in exceptional circumstances where it is compatible with other water-dependent uses occurring in or planned for the area."

Q. *Has the Olympic Pipeline Co. applied to DNR for easements across state owned aquatic lands recently?*

A. Yes. On August 10, 1998, the Olympic Pipeline Co. made application, numbered 51-070801, for several easements across state owned aquatic lands. This application lists several crossings of navigable streams managed by DNR under its delegated authority.

Exhibit I to that application includes two crossings on the Snoqualmie River, one on the Tolt river; one on the South Fork of the Snoqualmie River; one across the Yakima River and one across the Columbia River. The application to DNR references the EFSEC application, but does not include the Draft Environmental Impact Statement (DEIS). Exhibit JAB-1 lists the navigable river crossings identified in its application to DNR, and indicates the presence of existing use authorizations for which any new easement must be consistent.

Q. *What DNR regulations implement these statutory requirements?*

A. WAC 332-30-100 reiterates the management goals of RCW 79.90.455, and states that in order to achieve those goals, aquatic lands would be managed to promote uses and protect resources of state-wide value.

WAC 332-30-118 requires that tidelands, shorelands and beds of navigable waters be managed for the public benefit. Paragraph 23 of this section requires that the "Use and/or modification of any river system shall recognize basic hydraulic principles, as well as harmonize as much as possible with the existing aquatic ecosystems, and human needs."

WAC 332-30-122 (1)(c) requires that all "necessary federal, state and local permits" be acquired by the applicants, and that they must be "furnished to the Department prior to authorizing the use of aquatic lands."

WAC 332-30-122 (2) directs that special analysis be given to specific proposed

uses in addition to other management considerations.

Section (a) relates to environmental requirements:

Paragraph (i) requires that “Authorization instruments shall be written to insure that structures and activities on aquatic lands are properly designed, constructed, maintained and conducted in accordance with sound environmental practices.”

Paragraph (ii) directs that “Uses which cause adverse environmental impacts may be authorized on aquatic lands only upon compliance with applicable environmental laws and regulations and appropriate steps as may be directed are taken to mitigate substantial or irreversible damage to the environment.”

Paragraph (iii) declares that “Non-water dependent uses which have significant adverse environmental impacts shall not be authorized.”

Section (b) requires that use authorizations be written to provide public access to the water.

Section (d) authorizes the granting of “authorization instruments for the issuance of underwater pipelines, outfalls and cables...when proper provisions are included to insure against substantial or irreversible damage

to the environment and there is no practical upland alternative."

WAC 332-30-122 (3) directs that when proposed uses will have an "identifiable and quantifiable but acceptable adverse impact on state-owned aquatic lands, both within and without the authorized area, the value of that loss or impact shall be paid by the one so authorized in addition to normal rental to the department or port as appropriate."

WAC 332-30-122 (4) directs that any authorization for structures and improvements on public aquatic lands shall be based on the intended use, other uses in the immediate area, and the effect they would have on navigational rights of the public and private aquatic land owners. In order to comply with these requirements, the intended use must

i. Conform to the laws of regulators of any public authority;

ii. Be kept in good condition and repair by the authorized user of aquatic lands;

iii. Not be, nor become, a hazard to navigation;

iv. Be removed by the authorized user as stipulated in the authorization instrument.

WAC 332-30-122 (5) requires the authorized user to carry insurance, bonding, or other forms of security appropriate for the use on the public property.

Q. *What information or compliance is required by the existing Aquatic Lands Easement use authorization document?*

A. In summary, the Washington State Legislature explicitly delegated to DNR management authority over state owned aquatic lands, and prescribed management guidelines for state owned aquatic lands by which the Commissioner of Public Lands, and DNR, is directed to protect the public interests, as well as private rights. The application procedure is intended to develop information required to negotiate the Aquatic Lands Easement document. Much of the information required may only become available after EFSEC makes its recommendations to the Governor, and after the Governor issues a certification. This additional information is required in order for the decision maker to make a decision which balances all legislative requirements. This additional information is required to assure that there is no interference with other uses of easement property; that there has been, and will be compliance with all applicable federal, state and local laws; that there is a resolution of environmental risk and risk allocation issues; that there is a current Plan of Operations; that there is a suitable Sediment Investigation Report for each easement property; and that the grantee will indemnify, defend and hold harmless the "State, its employees, officers and agents from any and all liability, damages (including damages to land, aquatic life, and other natural resources)."

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

SIGNED AT Olympia, Washington on this _____ day of February, 1999.

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John A. Bower, Jr., Ph.D